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using the great seal as a trademark. The court seems to have taken the position that the statute did not deprive the defendant of liberty, since he never had been free to use the state arms as he did. The objection to this theory is that before the passage of the statute state and national emblems had been used for advertising, and yet no one had ever been hindered in the practice, so that if the common law did in truth forbid it, such common law arose neither from custom nor judicial decision.

In October, 1905, under a statute of Nebraska similar to that of Illinois, a merchant was indicted for selling beer bottles with an image of the national flag upon them. *Halter v. State*, 105 N. W. Rep. 298. The court held that the statute was valid, and based this decision on the only tenable ground,⁴ that though the act involved a deprivation of liberty under the Fourteenth Amendment, it could be justified as an exercise of the police power, that by preventing the national symbol from falling into contempt, it fostered the great civic virtue of patriotism, — in short, that it was in defense of public morality. It was suggested⁵ some time before this decision that the principle lying back of these laws was really the same as that appearing in the case of *U. S. v. Gettysburg Electric Ry. Co.*,⁶ where the federal government was allowed to condemn for a park the Gettysburg battlefield. That decision can hardly be quarreled with, for clearly patriotism is as much the concern of the state as are the private virtues. But that the presence of an American flag and a sheaf of national standards on the decorative cover of a cigar box has any real tendency to destroy our love of country, or that one who in good faith sells such a box should find himself a criminal, seems hardly reasonable. The law does accomplish the result of sparing the æsthetic sense of the more cultured classes, but it is still doubtful if such a purpose falls within the police power.⁷ A principle which permits the suppression indiscriminately of any human activity, on the ground that it offends against the vague canons of good taste, may not become oppressive while it is honestly administered by dispassionate courts and legislators; but it does remove the last vestige of the rigid guarantee against oppressive legislation, for it is invoked as an addendum to a power which admittedly cuts across every constitutional provision with which it comes in conflict.⁸

RECENT CASES.

APPEAL AND ERROR — EFFECT OF CHANGE OF STATUTE ON MANDATE OF APPELLATE COURT REVERSING AND REMANDING CAUSE. — In an action by a collector to obtain taxes, the plaintiff was successful in the lower court. On appeal the upper court decreed that as the tax levy was invalid "the judgment is reversed and remanded." Subsequently, but before the mandate of the Supreme Court had been filed in the lower court, a statute was passed validating the levy. In accordance with the new statute the lower court again gave judg-

⁴ *Cf.* Freund, Police Power, § 183.

⁵ 4 Columbia L. Rev. 376.

⁶ 160 U. S. 668.

⁷ *Cf.* *Bostock v. Sams*, 95 Md. 400; *People v. Green*, 85 N. Y. App. Div. 400. *Contra*, *Att'y-Gen'l v. Williams*, 174 Mass. 476; *cf.* also 17 HARV. L. REV. 275.

⁸ For a note taking the opposite view, see 35 N. Y. L. J. 670 (Feb. 19, 1906).

ment for the plaintiff. *Held*, that the lower court committed error in disregarding the mandate of the Supreme Court. *Chicago, etc., Co. v. People ex rel. McCord*, 38 Chi. Leg. N. 235 (Ill., Sup. Ct., Feb. 20, 1906).

If a cause is reversed and remanded with specific directions to enter judgment for one or the other party, the function of the lower court is purely ministerial, and probably no discretion would be allowed even if a change of law occurred. *Cf. Tourville v. Wabash Rd. Co.*, 148 Mo. 614. On the other hand, it seems clear that if a case is reversed and remanded with directions that a new trial be allowed, or if being merely reversed and remanded, the opinion of the appellate court indicates that there should be a new trial, then the lower court should of course regard all changes of law made subsequent to the reversal. *Cf. Woolman v. Garrenger*, 2 Mont. 405. In the principal case, no specific directions were given, but it appeared from the opinion that judgment should be entered for the defendant. Therefore, apart from special circumstances, a new trial should not have been allowed. *Treadway v. Johnson*, 39 Mo. App. 176. However, the fact that, in the absence of specific directions, the lower court must exercise its judgment in deciding what action should be taken to conform to the opinion of the Supreme Court, ought to vest it with the necessary discretion to enable it to give effect to laws passed after the reversal.

BANKRUPTCY — NATIONAL BANKRUPT LAWS — STATEMENT OF CLAIM AS EVIDENCE. — A creditor proved his claim before a referee in bankruptcy by a sworn statement in writing, according to § 57 *a* of the Bankruptcy Act of 1898. The trustee objected to the claim and offered evidence against it. *Held*, that the sworn statement is *prima facie* proof of the indebtedness, and that, the trustee's evidence being insufficient to rebut it, the claim will be allowed. *Whitney v. Dresser*, U. S. Sup. Ct., Feb. 19, 1906.

The case is in harmony with the decisions of the district courts under the Bankruptcy Acts of 1867 and of 1898. *In re Shaw*, 109 Fed. Rep. 780; *In re Carter*, 138 Fed. Rep. 846. The former Act calls the statement of claim a deposition, while the latter drops that term; but, under either, the statement is no more than an affidavit. Neither a declaration, nor a statement of claim against the estate of a deceased person, has probative value though verified by affidavit. But the sworn statement in bankruptcy proceedings is regarded as evidence sufficient to make out a *prima facie* case, because of the wording of the statute and of the custom of bankruptcy courts. The statute terms the statement "proof," and provides for hearing objections to it, thus putting the burden of going forward on the objector. The burden of proof is not shifted, but until the objector has produced evidence sufficient to overcome the evidence thus offered in favor of the claim, the claimant need do nothing more. *In re Sumner*, 101 Fed. Rep. 224. As bankruptcy proceedings would be seriously delayed if a mere objection compelled the creditor to offer evidence, the balance of convenience is strongly in favor of the present rule.

BOARDING-HOUSES — LIABILITY OF BOARDING-HOUSE KEEPER — LOSS OF GUEST'S PROPERTY. — While the plaintiff was a guest in the defendant's boarding-house, her jewels were stolen from her room by another guest. There was evidence of want of care on the part of the defendant in providing keys to the rooms and in the selection of guests. *Held*, that a boarding-house keeper owes the duty of reasonable care for the safe-keeping of guests' baggage. *Scarborough v. Cosgrove*, [1905] 2 K. B. 805.

The liability of an innkeeper for the loss of his guests' baggage closely approaches that of an insurer. *Coskery v. Nagle*, 83 Ga. 696, 6 L. R. A. 483; see 17 HARV. L. REV. 47. No such liability, however, is imposed upon a boarding-house keeper. *Manning v. Wells*, 9 Humph. (Tenn.) 746. Whether the latter is under any obligation for the safe custody of a guest's property is not well settled in England. It has been there held, however, in apparent conflict with the decision of the principal case, that a lodging-house keeper owes no duty in this respect. *Holder v. Soulby*, 8 C. B. (N. s.) 254. On the other hand, the American decisions on this point accord with the present case. *Smith v. Read*, 6 Daly (N. Y.) 33. An insurer's liability was originally imposed upon

innkeepers to protect travellers against loss at the hands of thieves with whom the innkeepers would often connive, and the risks of theft to which travellers are still subject have been deemed sufficient to warrant the continuance of the rule. While a boarding-house guest, being more permanently situated than a mere traveller, needs less protection than the latter, his risks would seem to be sufficiently great to require the exercise of reasonable care by the boarding-house keeper.

BROKERS — STOCKS CARRIED ON MARGINS — LIABILITY OF BROKER FOR SALE WITHOUT NOTICE TO CUSTOMER. — *Held*, that a sale by a broker of stock carried on margin, without notice to the customer of the time and place of sale, constitutes a conversion in the absence of a special agreement by the customer authorizing a sale without notice. *Content v. Barmer*, 34 N. Y. L. J. 1899 (N. Y., Ct. App., Feb., 1906). See NOTES, p. 529.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — ADMINISTRATION OF ESTATE OF LIVING PERSON. — After the plaintiff had been more than seven consecutive years absent from the state, he was presumed dead, and his estate was administered under a statute. The defendant, an executor of a testator who had left a legacy to which the plaintiff was entitled, paid the money to the latter's administrator. Later, the plaintiff appeared and demanded the legacy from the executor. *Held*, that he may recover it. *Selden's Executor v. Kennedy*, 52 S. E. Rep. 635 (Va.).

Aside from statute, the administration of the estate of a living person is absolutely void for lack of jurisdiction of the probate court. *Scott v. McNeal*, 154 U. S. 34; see *Griffith v. Frazier*, 8 Cranch (U. S.) 9, 23. Consequently, the validity of the payment by the defendant to the administrator must depend upon the constitutionality of the statute under which it was made. It was formerly said that the legislature could never authorize the administration of the estate of an absentee who was in fact living, without violating the "due process" clause of the Fourteenth Amendment. 11 HARV. L. REV. 264; *Clapp v. Houg*, 12 N. Dak. 600. Yet because a state, under its general authority to settle estates of deceased persons, is unable to administer estates of living persons, the conclusion does not follow that it lacks the very necessary power to provide by special legislation of a proper kind for administering the estates of those who are absent for an unreasonable time. And it has been held that, where the legislature provides for suitable notice and adequately safeguards the property of the absentee, it may confer upon its courts power to administer his estate, even though he be alive, after a reasonably long absence has raised the presumption of his death. *Cunnius v. Reading School District*, 198 U. S. 458. But the statute under review in the principal case failed to make any such provisions whatever.

CONSTITUTIONAL LAW — EMINENT DOMAIN — RIGHT OF WAY FOR MINING PURPOSES. — Under a Utah statute providing for the exercise of eminent domain to facilitate the working of mines, the defendant in error brought suit to condemn a right of way for an aerial bucket line across a placer mining claim of the plaintiff in error. The Supreme Court of Utah decided that this was a public use. *Held*, that this holding does not result in deprivation of property without due process of law within the meaning of the Fourteenth Amendment. *Strickley v. Highland Mining Co.*, 26 Sup. Ct. Rep. 301.

The court rests its decision on a late case upholding another Utah statute giving the right of condemnation for private irrigation ditches. *Clark v. Nash*, 198 U. S. 361; see 17 HARV. L. REV. 493; 6 COLUMBIA L. REV. 46. The local issue in all these cases is the troublesome question, — what constitutes a public use? See 15 HARV. L. REV. 399. Some recent adjudications seem still to adhere to the narrow test that the use must be by the public directly or by some quasi-public agency. See *Healy Lumber Co. v. Morris*, 33 Wash. 490. But however state courts may decide this, the federal question involved is whether a statute holding that a particular use is public for the purpose of taking private property, is so plainly unwarranted as to be in violation of the Fourteenth Amendment. While in *Clark v. Nash*, *supra*, the Supreme Court

expressly denied a possible inference that private property might be taken whenever the public interest may be promoted, the present opinion strongly tends that way in deferring very liberally to the public policy of a state, based on peculiar local conditions, as interpreted by legislature and state courts. The use here sustained as public is, however, in line with a suggestion of Professor Wambaugh, of the Harvard Law School, that the right of eminent domain may be exercised to enable individuals more effectively to utilize the forces of nature.

CONSTITUTIONAL LAW — EVIDENCE — APPLICATION OF PRIVILEGE AGAINST SELF-INCRIMINATION TO CORPORATIONS. — *Seem*, that the privilege against self-incrimination contained in the Fifth Amendment to the Constitution does not extend to corporations which are being prosecuted by the State. *Hale v. Henkle*, U. S. Sup. Ct., March 12, 1906. See NOTES, p. 523.

CONSTITUTIONAL LAW — POWERS OF THE EXECUTIVE — GOVERNOR'S RIGHT TO SUE. — The attorney-general of Mississippi was requested by the governor to bring suit enjoining the carrying out of a contract by the board of control, deemed by the governor unconstitutional. Upon the attorney-general's refusal (though the record did not disclose the fact), the governor brought suit in the name of the State. *Held*, that the bill is dismissed. *Henry v. State*, 39 So. Rep. 856 (Miss.). See NOTES, p. 524.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — DELEGATION OF LEGISLATIVE POWER. — By Act of March 3, 1899, Congress provided that whenever the Secretary of War should have good reason to believe any railroad or other bridge to be an unreasonable obstruction to navigation, he should, after a proper hearing, require the parties controlling such bridge to make any necessary alterations. It was further provided that if the alterations were not made within the prescribed time, criminal proceedings should be taken. *Held*, that the Act is not unconstitutional as a delegation of legislative power by Congress. *United States v. Union Bridge Co.*, 36 Pitts. Leg. J. 197 (U. S. Dist. Ct., W. D. Pa., Feb. 9, 1906).

For a discussion of the principles involved, see 19 HARV. L. REV. 203.

DAMAGES — MEASURE OF DAMAGES — DAMAGES IN CONTRACTUAL ACTIONS. — The plaintiff sued the defendant carrier for negligent delay in the transportation of scenery. *Held*, that the measure of damages is the reasonable rental value of the property. As to whether, by giving notice of the special circumstances to the carrier, the plaintiff could have recovered special damages or special profits, *quære*. *Weston v. Boston and Maine Rd.*, 34 Banker and Tradesman 541 (Mass., Sup. Ct., Feb. 26, 1906). See NOTES, p. 531.

EASEMENTS — CONTRACT FOR DISPLAY ADVERTISEMENTS. — The owner of a building agreed in writing to allow the defendant to display a sign on the side of it for one year. Subsequently the owner leased the building to the plaintiff, who took with notice of the above contract. The plaintiff removed the defendant's sign and brought suit in equity to restrain the defendant from attempting to replace it. *Held*, that the contract created in the defendant a right in the nature of an easement, which was not terminated by the lease to the plaintiff. *Levy v. Louisville Gunning System*, 89 S. W. Rep. 528 (Ky., Ct. App.). See NOTES, p. 526.

EQUITY — CONSTRUCTIVE TRUSTS — STATUTE OF LIMITATIONS AS DEFENSE TO INNOCENT CONSTRUCTIVE TRUSTEE. — The complainant, as receiver in bankruptcy of a corporation, filed a bill against the stockholders of the company to recover, *inter alia*, certain dividends which had been paid out of capital, more than six years before. It appeared that the defendant Downs received these dividends without notice that they were improperly paid. *Held*, that Downs, though originally liable as a constructive trustee to refund, will be protected by the statute of limitations, since he received the dividends in good faith,

but that this defense will not avail the other stockholders who had notice. *Mills v. Hendershot*, 62 Atl. Rep. 542 (N. J., Ch.).

Equity is not bound by the analogy of the statute of limitations, but may in its discretion apply it. *Rugan v. Sabin*, 53 Fed. Rep. 415. When there are concurrent remedies at law and in equity, and the former is barred by the lapse of the statutory period, equity will where fair apply the analogy of the statute to the equitable remedy. *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90. Where dividends have been improperly paid out of capital it has been held that *assumpsit* lies at the instance of the company to recover them. *Cf. Lexington, etc., Ins. Co. v. Page & Richardson*, 17 B. Mon. (Ky.) 412. But where the dividends were received in good faith the lapse of the statutory period will be a bar both at law and in equity. *Lexington, etc., Ins. Co. v. Page & Richardson, supra*. It seems therefore that the defendant Downs is properly entitled to the benefit of the statute. But the other stockholders, who knowingly received their dividends without right, should not receive similar protection in equity. *Cf. Vane v. Vane*, L. R. 8 Ch. 383.

EQUITY — INJUNCTION — PROTECTION OF A VALUABLE TRADE SECRET. — The defendant Nichols contracted with the complainant to devote his entire time and skill during a period of five years to the business of the complainant and never to divulge a valuable trade secret entrusted to him. With full notice of this contract, the other defendant, the American Foundry Co., induced Nichols to enter their employment with intent to gain possession of the complainant's trade secret. The complainant sought an injunction against both defendants. *Held*, that since the injury to the complainant by a disclosure of its trade secret would be irreparable, it is entitled to an injunction restraining not only the defendant Nichols from making the disclosure, but also the defendant company from employing Nichols or using any information acquired from him. *Taylor Iron, etc., Co., v. Nichols*, 61 Atl. Rep. 946 (N. J., Ch.).

By the better view, one who invents or discovers a secret process has a property right therein which a court of chancery will protect both against one who in violation of his contract undertakes to disclose it to third parties, and against those who with notice seek to profit by such disclosure. *Peabody v. Norfolk*, 98 Mass. 452. That portion of the injunction which restrained Nichols from disclosing, and the defendant company from using, the complainant's trade secret, clearly falls within this rule. *Cf. Salomon v. Hertz*, 40 N. J. Eq. 400. But the court goes further, and while expressly refusing to enjoin Nichols from taking other employment, restrains this particular defendant from employing him. There seems to be no case directly in point, either for or against such additional relief. As both defendants have shown themselves to be unscrupulous, to permit such employment would give them an excellent opportunity to devise a means of violating the injunction in safety, and such violation would work irreparable injury to the complainant. The circumstances, therefore, clearly seem to warrant the fuller protection of the innocent party against probable affirmative harm.

EXECUTORS AND ADMINISTRATORS — ADMINISTRATION BONDS — RIGHT OF SURETY TO PURCHASE PROPERTY OF ESTATE. — An administrator fraudulently procured an order from the probate court for the sale of land, and then sold it to the surety on his bond. The court approved the sale. *Held*, that the sale may be set aside at the suit of a devisee, though the surety was without notice of the fraud. *Fincke v. Bundrick*, 83 Pac. Rep. 403 (Kan.).

An administrator's sale to a stranger cannot be avoided by proof of fraud, if the purchaser is *bona fide*. *Adams v. Thomas*, 44 Ark. 267. In nearly all jurisdictions the sale is voidable, even though not fraudulent, if the administrator, judge, auctioneer, or administrator's attorney purchases, because of the moral obligation to avoid a conflict between self-interest and duty. *Cf. O'Dell v. Rogers*, 44 Wis. 136. The court in the present case uses the same argument to deprive sureties of the rights of ordinary *bona fide* purchasers, but as they have no duties in connection with the sale, the decision requires further explanation. The court, in suggesting that the surety promises that the administrator will perform

his duty and that he must make specific reparation for the administrator's default, overlooks the fact that the surety does not undertake that the administrator's duty will be performed, but rather to pay damages if it is not performed. The decision is without precedent and must rest on the ground that an administrator is inclined to favor his surety and that fraud is easily concealed. But a sale to the administrator's son is not voidable on that ground, and no reason of policy appears for applying a stricter rule to his surety. *Cain v. McGeenty*, 41 Minn. 194.

EXECUTORS AND ADMINISTRATORS — RIGHTS, POWERS AND DUTIES — RIGHT AND DUTY OF RETAINER. — A sole trustee died insolvent having misappropriated trust funds. His administratrix refused to assume the trust. Sometime thereafter she appointed new trustees, in accordance with statutory provisions, in whom, however, the trust property was not vested. These trustees asked that the administratrix be required to exercise her right of retainer in order to recoup the trust estate from the personal estate of the decedent. *Held*, that the right of retainer is a privilege which, under the circumstances, the administratrix could not be compelled to exercise. *In re Benett*, 54 W. R. 237 (Eng., Ct. App., Dec. 5, 1905).

It is well established that a personal representative holding a claim, either legal or equitable, in trust for another, may exercise the right of retainer for the benefit of the trust fund. In the case of legal claims there are decisions, and of equitable claims, *dicta* to the effect that he must so exercise it at the instance of the *cestui que trust*. *Fox v. Garrett*, 28 Beav. 16; *cf. Sander v. Heathfield*, L. R. 19 Eq. 21; see LEWIN, TRUSTS, 9th ed., 1037. This position appears sound, since even though retainer be a privilege merely, it should be a privilege for those beneficially interested, since they, and not the personal representative, are injured by the latter's inability to bring an action. The present case exhibits a readiness to depart from this rule, and to disregard the *dicta* supporting the *cestui's* right to compel the retainer in the case of an equitable claim. Though the conduct of the administratrix in refusing the trust duties may seem open to question, yet as it has been decided that she may so act and as the *cestuis* or the new trustees might have proceeded against the estate for breach of trust, this case may perhaps be distinguished. *Legg v. Mackrell*, 2 De G. F. & J. 551; *In re Ridley*, [1904] 2 Ch. 774; *Hatherley v. Dunning*, 54 L. J. Ch. 900.

GOOD WILL — GOOD WILL AS PROPERTY — WHETHER MERELY AN ATTRIBUTE OF LAND. — A racecourse company contracted to transfer to a reorganized company its land, business, and good will for £32,792, £10,000 representing the value of the land alone. The prospect of enjoying the same position as the old company under licenses from the Australian Jockey Club chiefly constituted the good will. Race meetings and clubs, not racecourses, were licensed. A deed was executed, conveying only the real estate, for the consideration of £10,000. *Held*, that the good will is not separate property, but merely enhances the value of the land, and that therefore the deed is subject to a stamp tax on the full amount, £32,792. *In re The Rosehill Racecourse Co.*, 5 N. S. W. Rep. 402.

Good will is generally recognized to be a form of property. See 16 HARV. L. REV. 135; 15 Fed. Rep. 315, note; *contra, Elliott's Appeal*, 60 Pa. St. 161. It was originally regarded as purely local and hence inseparable from realty, but in this country the prevailing view is that mercantile good will may be distinct from the land upon which the business is conducted, and even from chattels employed in the business. See *People v. Roberts*, 159 N. Y. 70, 79; *Washburn v. Nat'l Wall-Paper Co.*, 81 Fed. Rep. 17. This view has support in England also. *Potter v. Commissioners*, 10 Exch. Rep. 147; but *cf. Commissioners v. Muller & Co.*, [1901] A. C. 217. Obviously, the value of real estate may itself be enhanced by connection with a business. *Cf. Ex parte Punnett*, 16 Ch. D. 226. But it may equally be enhanced by a neighboring business, and such appreciation seems distinct from good will. Accuracy, therefore, demands that the good will which is the subject of a particular transfer be examined to discover whether it inheres, for example, in land, chattels, trade or firm names, licenses, agencies,

or the grantor's covenants. It is probable that in the principal case it could be enjoyed upon other land and consequently was distinct property. Unless, therefore, by construction of the deed the good will be included in the description, it is difficult to see how it passed at all by that conveyance.

LIBEL AND SLANDER — ACTS AND WORDS ACTIONABLE — LAUDATORY WORDS. — The defendant newspaper knew that physicians and a large part of the public considered advertising by a physician unprofessional, and one who advertised, a "quack." The plaintiff's petition alleged that, maliciously and with intent to injure him, the defendant published a laudatory account of an imaginary cure said to have been effected by the plaintiff, and that he was damaged in consequence thereof. *Held*, that the plaintiff states a valid cause of action based upon the implication that he had inspired the article. *Martin v. Nicholson Publishing Co.*, New Orleans Picayune, Jan. 5, 1906 (La., Sup. Ct.). See NOTES, p. 527.

LIBEL AND SLANDER — DAMAGES — SICKNESS CAUSED BY LIBEL AS ELEMENT OF DAMAGE. — The plaintiff brought this action of libel based on words libelous *per se*. The publication was without malevolence. In aggravation of damages the plaintiff was permitted to prove that the libel caused her acute mental distress as a result of which she became sick and unable to follow her profession. The jury awarded her \$3,000 damages. *Held*, that the verdict be set aside as excessive, since the fact that the libel caused sickness resulting in inability to follow a profession is a consequence too remote to be properly proved in aggravation of general damages. *Butler v. Hoboken Printing, etc., Co.*, 62 Atl. Rep. 272 (N. J., Sup. Ct.).

It is generally settled that in an action of libel only those damages may be recovered which are the proximate result of the libel. *Chamberlain v. Boyd*, 11 Q. B. D. 407. In determining what damages are "proximate" the courts have usually been rather strict. *Cf. Lynch v. Knight*, 9 H. L. Cas. 577. By the weight of authority, however, mental suffering is regarded as a proximate result of publishing a libel or slander, and as such it is a proper element to be considered by the jury in assessing general damages. *Chesley v. Thompson*, 137 Mass. 136. There is little authority as to whether sickness resulting from such mental anguish is a damage too remote to be the subject of recovery. In England and in New York the courts decline to hold it a sufficient special damage, where the words are not actionable *per se*. *Allsop v. Allsop*, 5 H. & N. 534; *Terwilliger v. Wands*, 17 N. Y. 54. A Texas case, however, permitted the jury to consider, presumably as an element of general damages, sickness and inability to labor resulting from slander. *Zeliff v. Jennings*, 61 Tex. 458. But the case at hand applies the English doctrine to the estimation of general damages in an action for words libelous *per se*.

MALICIOUS PROSECUTION — BASIS AND REQUISITES OF ACTION — COURT'S LACK OF JURISDICTION. — A writ of attachment in garnishee process was sued out maliciously and without probable cause from a court which had no jurisdiction, and damage resulted from the levy. *Held*, that an action for malicious prosecution will lie. *Ailstock v. Moore Lime Co.*, 52 S. E. Rep. 213 (Va.).

It is generally held that, notwithstanding a defect in the process, an action on the case for malicious prosecution may be maintained. *Ward v. Sutor*, 70 Tex. 343; *contra, Braveboy v. Cockfield*, 2 McMull. (S. C.) 270. But by the weight of authority, if the court before which the defendant made the charge or instituted the suit had no jurisdiction of the subject matter, malicious prosecution will not lie, on the ground that the proceedings were extra-judicial and merely an attempt at prosecution, and that trespass is the proper remedy. *Berger v. Saul*, 113 Ga. 869; *Vinson v. Flynn*, 64 Ark. 453. Yet the objection that technically there has been no prosecution applies equally well where the court lacked jurisdiction of the person; and in cases where the defendant does nothing more than apply for a warrant or for a writ, and in no way participates in the service thereof, it is not easy to see how he has committed a trespass. See *Marshall v. Betner*, 17 Ala. 832, 836. Since the defendant has maliciously and without probable cause set judicial machinery in motion against the plaintiff,

who has in fact suffered damage thereby, there seems to be no very grave difficulty in allowing case for malicious prosecution. *Cf. Antcliff v. June*, 81 Mich. 477.

MASTER AND SERVANT — FELLOW-SERVANT DOCTRINE — INJURIES TO PAUPERS COMPELLED TO LABOR. — A pauper inmate of a workhouse was compelled under penalty of law to work for the guardians. While thus employed he was injured by the negligence of another servant of the guardians. *Held*, that the fellow-servant doctrine does not apply, and that the pauper may recover from the guardians. *Tozeland v. Guardians*, 22 T. L. R. 300 (Eng., K. B. D., Feb. 14, 1906).

The fellow-servant rule has in effect established an exception in the law of agency to the general principle of *respondeat superior* in the case of injuries tortiously inflicted upon one servant by another servant of the same master, upon the ground that as the danger of the latter's tortious conduct might reasonably have been foreseen, the risk is presumed to have been voluntarily assumed by the injured employee. Hence the doctrine should not apply to a servant who has no option to assume or to refuse these risks. Accordingly, there are strong *dicta* that the fellow-servant rule is not applicable to convicts compelled to labor for contractors. *Boswell v. Barnhart*, 96 Ga. 521; *cf. Buckalew v. Tennessee, etc., Co.*, 112 Ala. 146. Similar language in opinions in the cases of slaves and of English pilots is really not in point, since neither the slaves nor the pilots were servants at all, but respectively chattels and independent contractors. See *Scudder v. Woodbridge*, 1 Ga. 195; *cf. Ponton v. Wilmington, etc., Co.*, 6 Jones Law (N. C.) 245; *Smith v. Steele*, L. R. 10 Q. B. 125. The pauper seeks the workhouse under the stress of his poverty, and once there he must work as ordered. The court's conclusion is, therefore, clearly justified that the pauper had no real option about assuming the risks from which he suffers.

MASTER AND SERVANT — NEGLIGENCE — WHO IS AN INDEPENDENT CONTRACTOR. — The plaintiff, while employed by the defendant in stowing cotton on board a vessel, was injured by a bale which fell upon him through the negligence of other persons employed by the defendant upon the same work. He brought this action against the defendant, who denied responsibility upon the ground that the labor union, of which the plaintiff was a member, reserved the right to appoint the foreman in charge of the work, who in turn had power both to select the laborers and to superintend the work. *Held*, that since the responsibility of employers for injuries received by workmen rests upon their freedom to select and superintend the latter, the defendant is not liable. *Farmer v. Kearney*, 39 So. Rep. 967 (La.).

One who contracts with an independent contractor for the performance of an act which is not unlawful, a nuisance, or manifestly dangerous to third parties, is not liable, under the rule of *respondeat superior*, for the negligence of such contractor or of his servants. *Murray v. Currie*, L. R. 6 C. P. 24. And the test usually applied to determine the relation to the defendant of the negligent party, whether servant or independent contractor, is whether the defendant retained the power of controlling the work in detail. *Murphey v. Carall*, 3 Hop. & C. 462; *Sadler v. Henlock*, 4 E. & B. 570. In the case at hand it appears that the defendant had the right neither to select the laborers nor to control the manner in which the work should be done. Whether the right to control rested with the foreman personally, or with the foreman as the officer and agent of the union is not clear. In either case it is plain that the defendant is not liable. *Cf. Murray v. Currie, supra*. Another fatal objection to the plaintiff's recovery could be based on the "fellow-servant" rule, which obtains in Louisiana. *Satterly v. Morgan*, 35 La. An. 1166.

NUISANCE — PRIVATE ACTION FOR PUBLIC NUISANCE — SPECIAL DAMAGE. — The plaintiff, a private citizen, sought to enjoin the defendant from excluding the plaintiff's cattle from government lands which the public had a right to use as a common for the pasturage of stock. The plaintiff proved no circumstances tending to show special damage to himself, other than the owner-

ship of land in the vicinity and a desire to avail himself of the right of common. *Held*, that this does not constitute such special damage as is necessary to support a private action for a public nuisance. *Wilkinson, etc., Co. v. McIlquham*, 83 Pac. Rep. 364 (Wyo.).

The usual broad statement of the law is that a private action for a public nuisance is maintainable only by one suffering thereby some special damage. A distinction, however, which seems valid, has been expressly recognized by some courts, and apparently unconsciously observed by many others. When the gist of the wrong is an injury to one's person or private property resulting from the alleged nuisance, a private action may be maintained even though that nuisance is indictable, and the plaintiff suffers no more damage than numerous other persons. *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.) 95. But when the gist of the wrong is a disturbance of a common and public right, then a private action lies only if the individual proves a special injury which is different from that suffered by the public in general and which is not too remote and consequential. See *Benjamin v. Storr*, L. R. 9 C. P. 400, 406. In applying these tests, each case must be considered on its own facts, although courts differ as to how consequential the particular injuries may be. *Cf. Wilkes v. Hungerford Market Co.*, 2 Bing. (N. C.) 281; *Ricket v. Metropolitan Ry. Co.*, L. R. 2 H. L. 175. All courts, however, would probably recognize the correctness of the present decision. *Cf. Winterbottom v. Lord Derby*, L. R. 2 Exch. 316.

NUISANCE — RECOVERY OF DAMAGES — RIGHT OF REVERSIONER. — As the result of the operation of a light and power plant, the owner of adjacent property suffered loss by being compelled to allow a reduction in rent upon making a renewal lease. He later filed a bill to prevent the continuance of the nuisance, and also asked for damages for loss of rent. After the bill was filed, but before trial, the nuisance was abated. *Held*, that he cannot recover damages. Three justices dissented. *Miller v. Edison, etc., Co.*, 34 N. Y. L. J. 1739 (N. Y., Ct. App., Feb. 6, 1906).

It has long been settled that a reversioner can recover for an injury to the inheritance, even though the tenant may have an action for injury to his particular estate on account of the same malfeasance. *Beddingfield v. Onslow*, 3 Lev. 209. But, in order to recover for a nuisance, it must be of such a permanent nature as necessarily to injure the reversion. *Simpson v. Savage*, 1 C. B. (N. S.) 347. Accordingly, the New York courts have allowed the reversioner to recover against the elevated railway, since, by its charter, it may remain indefinitely. *Kernochan v. New York Elevated Rd.*, 128 N. Y. 559. But where the nuisance is only temporary and affects only the present salable value of the reversion, the reversioner is held to have no claim, for the questionable reason that as a purchaser will always have a remedy when he enters into possession the price should not be diminished by such nuisance. *Rust v. Victoria, etc., Co.*, 36 Ch. D. 113. Conceding the correctness of that rule, which must now be regarded as established, the claim of the reversioner in the present case was justly refused. The law seems to proceed on the theory that the landlord should get full rent and let the tenant recover for injury to his possessory rights, rather than that the landlord should recover and reduce the rent.

PARTNERSHIP — RIGHTS OF PARTNERS INTER SE — RIGHTS OF DECEASED PARTNER'S REPRESENTATIVE AS AGAINST EQUITABLE MORTGAGEE. — A and B were partners under an agreement providing that upon the death of either, the surviving partner should take over the other's interests, paying his estate therefor. B, the surviving partner, executed an equitable mortgage, as security for a loan, on land which had been joint partnership estate. Subsequently B died insolvent, having failed to pay for A's interest in the business. A's executors claimed a lien on the proceeds of the real estate in priority to the mortgagee. *Held*, that the mortgagee has priority. *In re Bourne*, [1906] 1 Ch. 113.

The decision is unquestionably correct, but in its reasoning the court appears quite oblivious of both the reasoning and the decision of the House of Lords in a prior case. *Knox v. Gye*, L. R. 5 H. L. 656, 675; see also *Noyes v. Crawley*,

10 Ch. D. 31. According to that case, the right of a deceased partner's representative is a mere personal right to an accounting from the surviving partner, in no way attaching to the property. But the court in the present case rests its decision on the doctrine that the deceased partner's estate has an equitable lien on the partnership assets, and suggests that the surviving partner is an express trustee. See LINDLEY, PARTNERSHIP, 7th ed., 388. If the relation between the partners were a trust relation strictly, this decision would be questionable, for the executor's equity is prior, and the mortgagee's possession of title-deeds should not help him in the absence of any estoppel against the executor. See 30 SOL. JOUR. 72. An English commentator on this case concludes that only when the partnership agreement provides, as here, for the assumption by the survivor of the deceased partner's interest, can English conveyancers dispense with their custom of requiring the concurrence of the deceased partner's representative in a sale of land. 50 SOL. J. 307. According to *Knox v. Gye* the same conclusion would follow irrespective of the special agreement.

PATENTS — ASSIGNMENT — AGREEMENT TO ASSIGN FUTURE IMPROVEMENTS. — The defendant assigned to the plaintiff all the inventions he had already made in a certain art, including his inchoate patent rights therein, and agreed also to assign any future improvements on them he might make. This he failed to do. *Held*, that the contract will be specifically enforced. *Reece Folding Machine Co. v. Fenwick*, 140 Fed. Rep. 287 (C. C. A., First Circ.).

This case presents a legitimate application of the much abused doctrine of public policy. When by express agreement an inventor promises to assign any future improvement he may make on his original invention, whether the consideration for the original assignment is to cover also the assignment of future improvements, or whether he is to get merely nominal additional compensation, any inducement to improve the invention is wanting. Hence such an agreement seems inconsistent with the established policy of encouraging inventors. On the other hand, the consideration paid may give opportunity for investigation which the inventor would not otherwise enjoy. Furthermore, if the agreement to assign the patented improvement were not enforced, neither the inventor nor the assignee of the original patented invention could use it without the consent of the other, and the public would be entirely deprived of the benefit of it. *Royer v. Coupe*, 29 Fed. Rep. 358. In any case the agreement should be specifically enforced as being a reasonable protection to the buyer, in accordance with the analogy of a covenant, in the sale of a business and goodwill, not to engage in competition. *Maxim Nordenfelt, etc., Co. v. Nordenfelt*, [1893] 1 Ch. 630; *cf. Printing, etc., Co. v. Sampson*, L. R. 19 Eq. 462.

POLICE POWER — REGULATION OF PROPERTY AND USE THEREOF — FLAG LAWS. — The defendant was indicted under a statute forbidding the use of the American flag for advertising. He pleaded that the law was unconstitutional under the Fourteenth Amendment. *Held*, that the statute is valid. *Halter v. State*, 105 N. W. Rep. 298 (Neb.). See NOTES, p. 532.

PUBLIC LANDS — BONA FIDE PURCHASER. — Certain persons apparently became entitled to patents from the United States Government in accordance with the Timber and Stone Act of June 3, 1878. They then conveyed to the defendant company, a *bona fide* purchaser, all the timber upon the lands. The patents were subsequently issued, but after their issue such fraud was discovered as to give the United States the right to cancel the patents as against the original entymen. Meanwhile the defendant company had bought from the patentees the legal title to part of the land and had taken off all the timber. This was a bill to have the patents cancelled, both those which were still in possession of the original entymen and those which had been conveyed to the defendant, and to compel the defendant to account for the timber it had taken. *Held*, that the defendant company is a "*bona fide* purchaser" within the meaning of the Act, and is therefore protected both as to the patents which it had purchased and as to the additional timber conveyed and taken. *United States v. Detroit Timber & Lumber Co.*, 26 Sup. Ct. Rep. 282.

The Act under which the parties acquired their rights provided that a *bona*

fide purchaser from the patentee should not be affected by the forfeiture to which fraud would subject the latter. But one who *bona fide* purchases from the entryman the equitable title merely, is not, by virtue of such purchase, within the protection of the Act. *Hawley v. Diller*, 20 Sup. Ct. Rep. 986. If, however, the entryman conveys his equitable estate, a subsequently acquired legal title will inure to the benefit of his grantee. *Magruder v. Esmay*, 35 Oh. St. 221; *SAND. & H. ARK. DIG.* § 699. The present case raises the question whether one in whom the legal title has thus vested after a purchase of the equitable title will be affected by the entryman's fraud. The decision that the purchaser should be protected seems clearly right. The circumstance that the value was given before the grantor acquired legal title is immaterial, and the fact that the fraud, if discovered, would have vitiated the original equitable estate cannot affect a *bona fide* purchaser in possession of the legal title. *Gibson v. Lenhart*, 101 Pa. 522.

RECEIVERS — POWER OF FEDERAL COURT TO APPOINT ANCILLARY RECEIVER IN BANKRUPTCY. — The National Bankruptcy Act of 1898, § 2 (3), (15), vested courts of bankruptcy with "original jurisdiction . . . within their respective territorial limits . . . to appoint receivers, . . . to take charge of the property of bankrupts after the filing of the petition and until . . . the trustee is qualified." One who had been appointed receiver in the district in which involuntary proceedings had been instituted, petitioned *ex parte* to be appointed ancillary receiver by another court in whose district the debtor owned property. *Held*, that the latter court has jurisdiction to make the appointment. *In re Benedict*, 15 Am. B. Rep. 232 (U. S. Dist. Ct., E. D. Wis., Aug. 14, 1905).

The power exercised in the principal case is not expressly conferred by the Bankruptcy Act. In general, a receiver appointed by a federal court has no standing beyond its territorial jurisdiction. See *Kirker v. Owings*, 98 Fed. Rep. 499. The Bankruptcy Act, as supplemented by the general orders of the Supreme Court, permits proceedings in but a single jurisdiction. General Orders in Bank. VI, 172 U. S. 653. Hence it is impossible to file independent involuntary petitions and to secure the appointment of primary receivers in each district where the debtor owns property. Unless, therefore, the power above exercised exists, property situated outside the jurisdiction in which involuntary proceedings are instituted, is at the mercy of the debtor and his creditors until a trustee is appointed. Ancillary receivers have been appointed under the present Act. *In re Sutter Bros.*, 131 Fed. Rep. 654; see *In re Schrom*, 97 Fed. Rep. 760; *In re Peiser*, 115 Fed. Rep. 199. The existence of the power, however, has been questioned. See *In re Williams*, 123 Fed. Rep. 321; *In re Williams*, 120 Fed. Rep. 38. Under the Bankruptcy Act of 1867, which did not expressly authorize receiverships, primary receivers were appointed. *Keenan v. Shannon*, Fed. Cas. 7640. In the absence, also, of any bankruptcy statute, federal courts in insolvency proceedings in equity appointed ancillary receivers. *Sullivan v. Sheehan*, 89 Fed. Rep. 247. The present Act confers upon bankruptcy courts "jurisdiction in equity," and seems impliedly to authorize the recognized and necessary equitable machinery of ancillary receiverships. See 18 HARV. L. REV. 519.

RESTRAINT OF TRADE — CONTRACTS NOT TO ENGAGE IN CERTAIN BUSINESS — ENFORCEABILITY BY BUYER SEEKING MONOPOLY. — The defendant sold out his fruit business to the plaintiff with an agreement not to compete with the latter, in terms which the court considered reasonable and hence not an improper restraint of trade. In proceedings for an injunction to restrain a breach of this agreement, the defense was set up that the plaintiff's object in taking the defendant's promise was to obtain a monopoly of the fruit business throughout the United States. *Held*, that the defendant may nevertheless be enjoined. *Camors-McConnell Co. v. McConnell*, 140 Fed. Rep. 412 (Circ. Ct., Dist. Ala.).

In an action at law upon a contract collateral to an illegal agreement, the plaintiff's recovery ordinarily depends upon his ability to establish his case without having recourse to the illegality. *Hatch v. Hanson*, 46 Mo. App. 323.

Thus, if the present plaintiff had been suing at law, he would by this test have been entitled to damages, in spite of the undoubted vice in his monopolistic intention. But the suggestion is made that as the plaintiff has chosen to seek equitable relief, equity will look into the surrounding circumstances and if it finds a taint of illegality will refuse redress, in accordance with the maxim that he who comes into equity must have clean hands. Equity in applying this maxim, however, ordinarily follows the legal analogy, and looks no further than the immediate transaction. 1 POMEROY, *EQ. JURISP.*, § 399. The present case, in weighing the proximity of danger to the public rather than the motive of the plaintiff, reaches a desirable result which finds support elsewhere. *Cf. Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; *contra, Lufkin Rule Co. v. Fringeli*, 57 Oh. St. 596. As these contracts come before the courts in the future, their monopolistic tendency is bound to receive more and more attention. The holdings as to their validity will probably rest less upon definite legal principles than upon considerations of public policy. *Cf. National Enameling, etc., Co. v. Haberman*, 120 Fed. Rep. 415; see 15 HARV. L. REV. 580.

RULE AGAINST PERPETUITIES — CLAUSE MODIFYING ABSOLUTE DEVISE — REJECTING PART OF CLAUSE AS TOO REMOTE. — A will devising land in trust for X absolutely, had a codicil cutting down X's interest to a life estate determinable on alienation, with a remainder after X's death, which was void as violating the rule against perpetuities. If X tried to alien, the income for the remainder of his life was to go over on a limitation which was also void for remoteness, but the trustees had authority to pay it to X's wife if they chose. *Held*, that the power to pay the income to X's wife on alienation is valid, but that X has an absolute interest subject to that power. *Smidmore v. Smidmore*, 5 N. S. W. Rep. 492.

An absolute devise followed by a modification which is too remote operates as though no modification were attempted, because the testator has made two expressions of his intention, and it is presumed that he wished the first to stand unless the second were valid. *Ring v. Hardwick*, 2 Beav. 352. The present case, by enforcing part of the modifying clause, goes further than the cases rejecting the whole clause. The latter make the division where the testator did, while the former makes a new division and disposes of the property in a way the testator at no time intended. There is little authority on the point, though a briefly reported Australian case is in accord. *O'Brien v. Trustees*, 6 Argus L. Rep. (C. N.) 2. It has been held that a provision in a void modifying clause that a devisee shall have a separate use is effective, though the rest of the clause is rejected. *Harvey v. Stracy*, 1 Drew. 73. The somewhat analogous question whether a power may be validly exercised within the limits of the rule against perpetuities, although no time limit was imposed by the donor, has been decided both ways. See GRAY, *RULE AGAINST PERPETUITIES*, 2d ed., § 481. The present case seems to be correct, for the testator's actual intention is less departed from when part of the modifying clause is retained, than when the devisee takes the absolute interest.

TRUSTS — CESTUI'S INTEREST IN RES — TRUSTEE'S NEGLIGENCE AS GROUND FOR ESTOPPEL. — A bill was filed by trustees against an innocent mortgagor to obtain the cancellation of a forged discharge of a mortgage and for a foreclosure. The defendant claimed that a negligent failure of the trustees to give prompt notice had barred their claim. *Held*, that the plaintiffs can recover, since the elements of an estoppel were probably not present, and independently of this, that trustees in their representative capacity cannot be estopped. *Vohmann v. Michel*, 96 N. Y. Supp. 309.

The court was probably correct in holding that the elements of an estoppel were absent, so that even if the plaintiffs had been suing for their own benefit they would have recovered. But assuming that the plaintiffs were personally barred, the question then arises whether the decision is right in allowing them to recover for their *cestui*. The general rule is that where a *cestui* seeks to enforce a claim against one who has dealt with his trustee, he must work out his rights through the trustee, and any defense, such as the statute of limita-

tions, which exists against the latter will equally defeat the *cestui*. *Ex parte Dale*, Buck 365; *Meeks v. Olpherts*, 100 U. S. 564. It may be contended that the defense of estoppel is analogous to a statutory bar, and that the claim, by whomsoever prosecuted, is absolutely annihilated thereby. *Cf. Lloyds Bank v. Bullock*, [1896] 2 Ch. 192. It is believed, however, that an estoppel being essentially a device created by equity, resembles an equitable cross-claim rather than a prohibition of the suit. Further, it is the generally established doctrine that the prior of two equities against the same person will prevail. Accordingly, since the *cestui's* equity was manifestly prior to the defendant's, the case properly allows the trustees to recover for him. *Cf. Marx v. Clisby*, 126 Ala. 107; *Keate v. Phillips*, 18 Ch. D. 560, 577.

TRUSTS FOR CHARITABLE USES — *CY PRÈS* AND THE VISITATORIAL POWER. — One MacKenzie conveyed certain real estate upon charitable trusts to be conducted under the care of the Presbytery of New Jersey. At the termination of those trusts the property was to vest, and did in fact vest, in the Presbytery of New Jersey upon similar trusts. Descendants of the original grantor filed a bill to restrain the Presbytery of New Jersey from using the property other than as stipulated by the deed of trust. *Held*, (1) that if compliance with the details of the trust has become impracticable the property should be administered for similar charities under the *cy près* doctrine, and (2) that since their ancestor granted away his visitatorial power the complainants have no standing in court. *MacKenzie v. Trustees of Presbytery of New Jersey*, 61 Atl. Rep. 1027 (N. J., Ct. Er. & App.).

Other cases in New Jersey have apparently been decided upon *cy près* principles. *Newark v. Stockton*, 44 N. J. Eq. 179; *Pennington v. Metropolitan Mus. of Art*, 65 N. J. Eq. 11. But the state is now for the first time added to the short list of jurisdictions that expressly recognize the *cy près* doctrine as applied to charitable trusts. See 3 POMEROY, EQ. JURISP., §§ 1027-1029. The power of visitation or direction of charitable corporations may be retained by the founder and his heirs, but is most often granted to third persons. See TUDOR, CHARIT. TRUSTS, 3d ed., 72 *et seq.*; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 673-674. Upon the failure of the appointees longer to hold the visitatorial office, as here, where the property itself vests in them, it seems advisable that the power should be exercised by the attorney-general in the name of the state as the protector of charities. *Rex v. Bishop of Chester*, 2 Stra. 797. The probable number of the heirs and their remote interest make its exercise by them inconvenient. Any suit with reference to the administration of this charity, it is held, should have been brought in the name of the attorney-general on the relation of the complainants, or by the Presbytery in a bill for instructions.

WILLS — INCORPORATION BY REFERENCE — WILLS ACT. — A testator had made a will which was void for lack of the required attestation. Later he executed a valid codicil referring to the previous document. *Held*, that as the doctrine of incorporation by reference does not obtain in New York, the codicil alone will be admitted to probate. *In re Emmons' Will*, 96 N. Y. Supp. 506 (App. Div.). See NOTES, p. 528.

WITNESSES — COMPETENCY IN GENERAL — HUSBAND AND WIFE — INDICTMENT FOR KILLING CHILD. — Under an indictment for murder the defendant was accused of having shot and killed his child, a baby fourteen months old, at the time in its mother's arms. The wife gave evidence, at the instance of the state, against her husband, who was convicted. *Held*, that the admission of the wife's testimony was error for which a new trial should be granted. Two justices dissented. *State v. Woodrow*, 52 S. E. Rep. 545 (W. Va.).

The established doctrine of the common law that one spouse cannot testify against the other was based upon grounds of public policy, the idea being that domestic concord would be disturbed by compelling or permitting such testimony. See 3 WIGMORE, EV. §§ 2227-8. It was perceived, however, that at least in cases of personal injury done by one to the other, an exception to the

rule must be made; otherwise domestic privacy would deprive the weaker of the law's protection against the violence of the stronger. *Lord Audley's Case*, 3 How. St. Tr. 402. The principle of this exception seems applicable to the present case, though no actual authorities have been found squarely in point. Cf. *Clarke v. State*, 117 Ala. 1. The subjection of an infant of tender years to the power of its parents is even more complete than that of either spouse to the other. Moreover, if the parents cannot testify against one another, such an infant is equally without the protection which the probability of discovery would otherwise afford. This general topic has been very widely affected by statutes. See 1 WIGMORE, EV. § 488.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

DESTRUCTIBILITY OF CONTINGENT REMAINDERS. — The rule was early laid down that devises of contingent future estates which, according to the state of affairs at the testator's death, were capable of taking effect as remainders, would be held to be contingent remainders, and not executory devises. *Carwardine v. Carwardine*, 1 Eden 34 (1757). Thus, where a future interest was limited upon a contingency which might happen either before or after the termination of the particular estate, it was held to be a contingent remainder. The result was to bring into operation the principle that a contingent remainder fails absolutely unless it vests during the continuance of the particular estate or at the instant of its termination. Whether the testator's intention is accomplished or defeated by holding the future interest in this class of cases to be a destructible contingent remainder, is the subject of a series of interesting essays in the *Law Quarterly Review*. *Contingent Future Interests, after a Particular Estate of Freehold*, by Albert Martin Kales, 21 L. Quar. Rev. 118. *Future Interests in Land*, by Edward Jenks, 20 *ibid.* 280; 21 *ibid.* 265.

Mr. Kales lays down two theses: first, the rule requiring future interests to take effect as contingent remainders or fail entirely, is not a rule of construction designed to ascertain the testator's intention, but is, rather, like the rule in Shelley's case, an absolute rule of law often defeating his intention; second, the rule itself has been abrogated without the aid of statute, and destructible contingent remainders no longer exist. He maintains that when a future contingent interest is limited after a particular estate, upon a contingency which may happen either before or after the particular estate ends, the language used, in the absence of any expressions to the contrary, shows an intent that the future interest shall take effect whenever the contingency occurs, regardless of the time of termination of the particular estate. In *Festing v. Allen*, [12 M. & W. 279 (1843)] the limitation was substantially to A for life, and after her death to all her children who should attain twenty-one. In *In re Lechmere and Lloyd* [18 Ch. D. 514 (1881)] the limitation was to A for life, and after her death to such children of A as, either before or after her death, should attain twenty-one. In the former decision, the limitation was held to create a contingent remainder; in the latter, an executory devise. But the intention, the writer argues, is as clearly expressed in the first case as in the second, that the future interest "take effect when the event happens without reference to the termination of the preceding interest." The rule requiring contingent future interests to take effect "by way of succession," *i. e.* as contingent remainders, was established prior to the Statutes of Uses and of Wills, when no other form of contingent future estate was legal. These statutes, however, made it possible for such interests to take effect "by way of interruption," *i. e.* as executory devises; and executory devises were held indestructible. See *Pells v. Brown*, Cro. Jac. 590 (1620). Where the contingency upon which the future estate was